REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.2704 OF 2010
(Arising out of SLP(C) No.19935/2009)

Vikram Vir Vohra ..Appellant(s)

Versus

Shalini Bhalla ..Respondent(s)

J U D G M E N T

GANGULY, J.

1. Leave granted.

2. This appeal by the husband, impugns the judgment and order dated 27.07.09 of Delhi High Court which upheld the judgment and order of the Additional District Judge passed in relation to applications filed by both the parties under Section 26 of the Hindu Marriage Act (hereinafter "the Act"). The impugned judgment

permitted the respondent-wife to take the child with her to Australia.

3. The material facts of the case are that the parties to the present appeal were married as per the Hindu rites on 10.12.2000. A child, Master Shivam, was born to them on 05.08.02. In view of irreconcilable differences between the parties they had agreed for a divorce by mutual consent under Section 13-B of the Act and filed a petition to that effect and on 05.09.06 a decree of divorce on mutual consent was passed by the Additional District Judge, Delhi.

4. As regards the custody of the child there was some settlement between the parties and according to the appellant the same was incorporated in paras 7 and 9 of the petition filed under Section 13-B (2) of the Act. Those paragraphs are as under:

> "The parties have agreed that the custody of the minor son Master Shivam shall remain with the mother, petitioner No.1 who being the natural mother is also the guardian of the son Master Shivam as per law laid down by the Supreme Court of India. It is, however, agreed that the father petitioner shall have right of

visitation only to the extent that the child Master Shivam shall be with the father, petitioner No.2, once in a fortnight from 10 AM to 6.30 PM on a Saturday. Petitioner No.2 shall collect the child Master Shivam from WZ-64, 2nd Floor Shiv Nagar Lane No.4, New Delhi-58 at 10 AM on a Saturday where the child is with his mother. And on the same day at by 6.30 PM, the petitioner No.2 would leave the child back at the same place with the mother i.e. petitioner No.1 and in case he does not do so petitioner No.1 the mother shall collect the child from petitioner No.2 on the same day. Both parties undertake before this Hon'ble Court that they would not create any obstruction in implementation of this arrangement.

The petitioner No.1 shall take adequate care of the child in respect of health, education etc., at her own cost. In case the petitioner No.1 changes her address or takes the child outside Delhi, she shall keep petitioner No.2 informed one week in advance about the address and telephone nos. and the place where the child would be staying with the mother, to enable the petitioner No.2 to remain in touch with the child.

The petitioner No.1 has received all her Stridhan and other valuables, articles and other possessions, and nothing remains due to her from the petitioner No.2. The petitioner No.1 and the child Shivam has no claim to any property or financial commitment from petitioner No.2 and all her claims are settled fully and finally".

5. Thereafter the respondent-wife filed applications dated 07.11.06 and 9.05.08 and the

appellant-husband also filed applications dated 17.11.07 and 16.02.09 under Section 26 of the Act seeking modification of those terms and conditions about the custody of the child.

6. The respondent was basing her claim on the fact that she wanted to take the child with her to Australia where she was employed for gain with a request to revoke the visitation rights granted to the appellant for meeting the child. This she felt will be conducive to the paramount interest and welfare of the child. The appellant on the other hand sought permanent custody of the child under the changed circumstances alleging that it is not in the interest of the child to leave India permanently.

7. The Trial Court vide its order dated 06.04.09 took notice of the fact that in the joint petition of divorce, parties voluntarily agreed that the custody of the child shall remain with the mother and father shall have only visiting rights, in the manner indicated in the mutual divorce decree. The Court modified the terms and

conditions of the custody and visitation rights of the appellant about the minor child. By its order the Trial Court had allowed the respondent to take the child with her to Australia but also directed her to bring the child back to India for allowing the father visitation rights twice in a year i.e. for two terms – between 18th of December to 26th of January and then from 26th of June to 11th of July.

8. Being aggrieved by that order of the Trial Court, the appellant appealed to the High Court. It was argued by the appellant since no decree was passed by the Court while granting mutual divorce, an application under Section 26 of the Act does not lie and in the absence of specific provision in the decree regarding the custody and visitation rights of the child, the Trial Court has no jurisdiction to entertain the petition afresh after passing of the decree.

9. The High Court took into consideration the provisions of Section 26 of the Act and was of the view that the aforesaid provision is

intended to enable the Court to pass suitable orders from time to time to protect the interest of minor children. However, the High Court held that after the final order is passed in original petition of divorce for the custody of the minor child, the other party cannot file any number of fresh petitions ignoring the earlier order passed by the Court.

10. The Court took into consideration that even if the terms and conditions regarding the custody and visitation rights of the child are not specifically contained in the decree, they do form part of the petition seeking divorce by mutual consent. It was of the view that absence of the terms and conditions in the decree does not disentitle the respondent to file an application under Section 26 of the Act seeking revocation of the visitation rights of the appellant.

11. It is important to mention here that the learned Judge of the High Court had personally interviewed the child who was about 7 years old

to ascertain his wishes. The child in categorical terms expressed his desire to be in the custody and guardianship of his mother, the respondent. The child appeared to be quite intelligent. The child was specifically asked if he wanted to live with his father in India but he unequivocally refused to go with or stay with him. He made it clear in his expression that he was happy with his mother and maternal grandmother and desired only to live with his mother. The aforesaid procedure was also followed by the learned Trial Court and it was also of the same view after talking with the child.

12. Being aggrieved with the judgment of the High Court the appellant has approached this Court and hence this appeal by way of Special Leave Petition.

13. We have also talked with the child in our chambers in the absence of his parents. We found him to be quite intelligent and

discerning. The child is in school and from the behaviour of the child, we could make out that he is well behaved and that he is receiving proper education.

14. The child categorically stated that he wants to stay with his mother. It appears to us that the child is about 8-10 years of age and is in a very formative and impressionable stage in his life. The welfare of the child is of paramount importance in matters relating to child custody and this Court has held that welfare of the child may have a primacy even over statutory provisions [See **Mausami Moitra Ganguli** vs. **Jayant Ganguli** – (2008) 7 SCC 673, para 19, page 678]. We have considered this matter in all its aspects.

15. The argument of the learned counsel for the appellant, that in view of the provisions of Section 26 of the Act, the order of custody of the child and the visitation rights of the

appellant cannot be changed as they are not reflected in the decree of mutual divorce, is far too hyper technical an objection to be considered seriously in a custody proceeding. A child is not a chattel nor is he/she an article of personal property to be shared in equal halves.

16. In a matter relating to custody of a child, this Court must remember that it is dealing with a very sensitive issue in considering the nature of care and affection that a child requires in the growing stages of his or her life. That is why custody orders are always considered interlocutory orders and by the nature of such proceedings custody orders cannot be made rigid and final. They are capable of being altered and moulded keeping in mind the needs of the child.

17. In **Rosy Jacob** vs. **Jacob A Chakramakkal** - [(1973) 1 SCC 840], a three judge Bench of

this Court held that all orders relating to custody of minors were considered to be temporary orders. The learned judges made it clear that with the passage of time, the Court is entitled to modify the order in the interest of the minor child. The Court went to the extent of saying that even if orders are based on consent, those orders can also be varied if the welfare of the child so demands.

18. The aforesaid principle has again been followed in **Dhanwanti Joshi** vs. **Madhav Unde** - [(1998) 1 SCC 112].

19. Even though the aforesaid principles have been laid down in proceedings under the Guardians and Wards Act, 1890, these principles are equally applicable in dealing with the custody of a child under Section 26 of the Act since in both the situations two things are common; the first, being orders relating to custody of a growing child and

secondly, the paramount consideration of the welfare of the child. Such considerations are never static nor can they be squeezed in a strait jacket. Therefore, each case has to be dealt with on the basis of its peculiar facts.

20. In this connection, the principles laid down by this Court in **Gaurav Nagpal** vs. **Sumedha Nagpal** reported in (2009) 1 SCC 42 are very pertinent. Those principles in paragraphs 42 and 43 are set out below:

> "42. Section 26 of the Hindu Marriage Act, 1955 provides for custody of children and declares that in any proceeding under the said Act, the court could make, from time to time, such interim orders as it might deem just and proper with respect to custody, maintenance and education of minor children, consistently with their wishes, wherever possible.
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> 43. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the "welfare of the child" and not rights of the parents under a statute for the time being in force".

21. That is why this Court has all along insisted on focussing the welfare of the child and accepted it to be the paramount consideration guiding the Court's discretion in custody order. See **Thrity Hoshie Dolikuka** vs. **Hoshiam Shavaksha Dolikuka** - [AIR 1982 SC 1276], para 17.

22. In the factual and legal background considered above, the objections raised by the appellant do not hold much water.

23. Now coming to the question of the child being taken to Australia and the consequent variations in the visitation rights of the father, this Court finds that the Respondent mother is getting a better job opportunity in Australia. Her autonomy on her personhood cannot be curtailed by Court on the ground of a prior order of custody of the child. Every person has a right to develop his or her potential. In fact a right to development is a basic human right. The respondent-mother cannot be asked to choose between her child

and her career. It is clear that the child is very dear to her and she will spare no pains to ensure that the child gets proper education and training in order to develop his faculties and ultimately to become a good citizen. If the custody of the child is denied to her, she may not be able to pursue her career in Australia and that may not be conducive either to the development of her career or to the future prospects of the child. Separating the child from his mother will be disastrous to both.

24. Insofar as the father is concerned, he is already established in India and he is also financially solvent. His visitation rights have been ensured in the impugned orders of the High Court. His rights have been varied but have not been totally ignored. The appellant-father, for all these years, lived without the child and got used to it.

25. In the application dated 9.5.2008 filed before the Additional District Judge, Delhi, the mother made it clear in paragraph 12 that she is ready to furnish any undertaking or bond in order to ensure her return to India and to make available to the father, his visitation rights subject to the education of the child. This Court finds that so far as the order which had been passed by the High Court, affirming the order of the Trial Court, the visitation rights of the appellant-father have been so structured as to be compatible with the educational career of the child. This Court finds that in this matter judicial discretion has been properly balanced between the rights of the appellant and those of the respondent.

26. In that view of the matter, this Court refuses to interfere with the order passed by the High Court. The appeal is dismissed with the direction that the respondent-mother,

before taking the child to Australia, must file an undertaking to the satisfaction of the Court of Additional District Judge-01, (West), Delhi within a period of four weeks from date. No order as to costs.

.....J.
(G.S.SINGHVI)

.....J.
(ASOK KUMAR GANGULY)

New Delhi
March 25, 2010